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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

CENTER FOR ENVIRONMENTAL HEALTH, *et al.*,

Plaintiffs,

v.

ANDREW WHEELER, in his official capacity as Administrator of the U.S. Environmental Protection Agency, *et al.*,

Defendants,

and

CROPLIFE AMERICA,

Intervenor-Defendant.

Case No. 4:18-cv-03197-SBA

INTERVENOR-DEFENDANT CROPLIFE AMERICA'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The Honorable Saundra Brown Armstrong

INTRODUCTION

Plaintiffs have failed to contest many of the arguments presented in Intervenor-Defendant's Initial Memorandum (Dkt. 52), most notably that 18 of the registration actions challenged in their Third Claim for Relief occurred long before the initiation of consultation and thus cannot be subject to ESA Section 7(d).[1] The Court should dismiss the challenge to those 18 registration actions. In addition, for the reasons set forth below, in Defendants' Reply, and in Defendants' and Intervenor-Defendant's prior filings, Plaintiffs' other claims should also be rejected.

ARGUMENT

I. PLAINTIFFS' EFFORTS TO DEMONSTRATE STANDING ARE INSUFFICIENT.

Plaintiffs' arguments in support of standing wholly fail. Three merit specific attention.

First, as explained in Intervenor-Defendant's Initial Memorandum, Plaintiffs have not alleged adequate facts to demonstrate standing for "each claim" they assert, as the Supreme Court requires. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006). Plaintiffs seek to excuse their failure by citing *Ctr. for Biological Diversity v. Envtl. Prot. Agency*, 316 F. Supp. 3d 1156, 1165 (N.D. Cal. 2018) ("*CBD v. EPA*"), for the proposition that standing can be pled by alleging a cognizable interest in some species that might be affected by some malathion products. But that citation is inapposite. In *CBD v. EPA*, the plaintiffs (including one of the

[1] *See* Intervenor-Defendant CropLife America's Joinder in Defendants' Motion to Dismiss and Memorandum in Support of that Motion ("Initial Memorandum") Dkt. 52 at 6-8. Plaintiffs claim that Intervenor-Defendant cannot seek to dismiss their Third Claim for relief because the Government has not done so. Intervenor-defendant is a full party in this case and is not restricted to merely echoing the Government's arguments, even though as a procedural matter the Court has asked Intervenor-Defendant and the Government to cooperate in drafting their briefs and sharing page limits. *See Maclellan Indus. Servs. v. Local Union No. 1176*, No. C06-04021 MJJ, 2006 WL 2884410, at *3 (N.D. Cal. Oct. 10, 2006) ("After intervention, the intervenor has full party status . . . ."). Moreover, the Court may dismiss a claim at any time, even *sua sponte*, if it determines it lacks subject matter jurisdiction. *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015).

plaintiffs here) stipulated to remove technical products from their complaint because they were "either only for indoor use or only for use in the manufacture of other pesticide products." *See CBD v. EPA*, Dkt. 281 at 2. The Court's decision thus concerned only "end-use" registrations that authorized use of products in the field. The fact that the Court found it not "implausible" that each of the registrations might harm endangered species was no surprise. *Id.* at 1165. Here, however, that is not the case. Most obviously, two of the challenged registration actions only authorize "technical products." Such products are used solely in factories to produce "end-use" products. They thus can have no effect on species outside the factory walls.

CBD v. EPA also is distinguishable because that Court accepted the plaintiffs' initial allegations as plausible but explained that the plaintiffs would be held to a much higher level of standing proof when they sought summary judgment. *See id.* at 1165–66. Here, Plaintiffs already have submitted ten affidavits to support their standing arguments and assert that no further discovery into standing is required. *See* Joint Case Management Statement, Dkt. 53 at 6. In those affidavits, Plaintiffs rely on "nine members with demonstrated interests in over 85 particular ESA-protected species." Dkt. 54 at 8. But that assertion falls far short of the facts alleged in *CBD v. EPA*, in which the plaintiffs argued they represented "tens of thousands" of members who would be affected by a 98-page list of species. *See CBD*, 316 F. Supp. 3d at 1165; *CBD v. EPA* Dkt. 270-1. The Complaint here cannot plausibly be read to allege that *every* challenged registration somehow affects one of the 85 particular species, and none of Plaintiffs' affidavits state that any of the specifically challenged registrations could affect an endangered species in which the affiants have an interest. While in some situations it might be appropriate for a Court to allow less detailed allegations to support standing, Plaintiffs should not be given

such leeway here, where they have submitted affidavits they claim fully demonstrate their standing.

Second, Plaintiffs have not adequately pleaded redressability. A Court cannot compel agency action that the agency was not "required to take." *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). Here, the statute sets a deadline for completion of consultation *and* allows for its extension. Defendants have followed this statutorily-specified procedure for extension to set a date certain for consultation to be completed. *See* Dkt. 54 at 16. Plaintiffs' demand to compel the completion of consultation is thus moot. Furthermore, as indicated above, Plaintiffs cannot reasonably trace any of their alleged harm to the technical registrations they challenge unless they argue that at least one of the endangered species or critical habitats they purport to protect is found within manufacturing plants. They have made no such allegations. Thus, granting Plaintiffs' requested relief as to those registrations would not redress any alleged injury.

Third, Plaintiffs have not alleged facts sufficient to show that the interest they seek to protect is arguably within the zone of interests to be protected by "*the particular provision of law* upon which the plaintiff relies." *Bennett v. Spear*, 520 U.S. 154, 175–76 (1997) (emphasis added). The relevant provision here is ESA Section 7(b)(1)(B). It expressly gives applicants the right to grant extensions so that consultation can be timely concluded but still allow for adequate consideration of the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). Plaintiffs argue that they fall within the zone of interests covered by Section 7(b)(1)(B) because it is part of Section 7 and they fall within the broader interests protected by that section overall. *See* Dkt. 54 at 13-14. Plaintiffs miss the point of *Bennett*, and their admission that *CBD v. U.S. Dep't of Interior*, 15-cv-658, 2015 WL 5012889 (N.D. Cal. Aug. 24, 2015), presented a different situation eliminates other portions of that decision's precedential value. Having a broader interest

in species protection does not give them a right to contest a statutorily-authorized deadline extension.

II. PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE APA.

In addition to lacking standing, Plaintiffs' second Claim for Relief fails to state a claim under the APA. Plaintiffs assert two alternative arguments to support the claim: that Defendants either unreasonably delayed consultation or acted arbitrarily and capriciously in extending the completion deadline. Both theories fail as a matter of law.

First, Plaintiffs claim that Defendants' extension is unreasonable. But the APA "does not give [courts] license to 'compel agency action' whenever the agency is withholding or delaying an action." *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010). To the contrary, the "ability to 'compel agency action' is carefully circumscribed to situations where an agency has ignored a specific legislative command," *id.,* not to those in which an agency is taking longer than a complainant would like to complete an administrative process.[2]

In addition, Plaintiffs are patently incorrect in arguing that delay is unreasonable because FWS has already determined that "that EPA's authorizations of malathion are likely to jeopardize the continued existence of certain endangered or threatened species." Dkt. 54 at 18. FWS has made no final determinations regarding jeopardy. As the Complaint itself alleges, FWS has not published a final Biological Opinion. Second Am. Compl. ¶ 73. Every statement Plaintiffs cite as a jeopardy determination by FWS is an interim judgment by a Service staff member that does not have the imprimatur of a final agency action. *Cf. Dow AgroSciences LLC v. Nat'l Marine*

[2] Plaintiffs color their arguments as if the agencies have never before considered the effects of Malathion on endangered species, but they have—as least one plaintiff knows—and they continue to do so as they work to complete the final Biological Opinion and evaluate potential impacts on species. *CBD v. EPA*, Dkt. 270 ¶¶ 780-81 ("In 1989, EPA concluded consultation with the FWS, and FWS issued a Biological Opinion [that] . . . addressed . . . malathion.").

Fisheries Serv., 707 F.3d 462, 469 (4th Cir. 2013) (disregarding NMFS toxicologist's affidavit because he "did not explain how he had authority to speak on behalf of the Fisheries Service to explain or justify its decisions."); *Friends of Potter Marsh v. Peters*, 371 F. Supp. 2d 1115, 1119 (D. Alaska 2005) ("[T]he issuance of the draft EIS is not a final agency action.").

Plaintiffs' only other objection to the Service's extension is that the agencies already have spent years reviewing relevant information, working with stakeholders, and reviewing public comments. *See* Dkt. 54 at 18. But prudent evaluation of complex facts and issues may take time, and taking that time cannot alone make an extension unreasonable.[3] Plaintiffs have failed to put forth facts showing the objective *unreasonableness* of the delay here in the face of the issues being addressed.

Finally, Plaintiffs' argument that Defendants' decision to extend the deadline for consultation was itself an arbitrary and capricious agency action fails because, as Plaintiffs themselves concede, "[f]inal agency action is reviewable" only "if it marks the consummation of the agency's decisionmaking process." Dkt. 54 at 21. An extension anticipated by statute does not mark the end of a decision-making process.

CONCLUSION

For all of the reasons set forth and incorporated by reference above, Plaintiffs' Second Amended Complaint for Declaratory and Injunctive Relief should be dismissed.

Dated: April 19, 2019

Respectfully submitted,

By: /s/ David B. Weinberg

[3] Plaintiffs slippery-slope argument that a delay of "fifty years to count the number of insects left in the United States before completing consultation," Dkt. 54 at 29, would be unreasonable is irrelevant here, where a date certain for completion of consultation has been set.

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